U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 August 2004

BALCA Case No.: 2003-INA-179
ETA Case No.: P2002-VA-03374574

In the Matter of:

TAJINDER SINGH RUPRAI,
Employer,

on behalf of

BHAJAN KAUR,
Alien.

Appearance: Harnam S. Arneja, Esquire
Washington, D.C.
For the Employer and the Alien

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: Burke, Chapman, and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO

denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 27, 2001, the Employer, Tajinder Singh Ruprai, applied for labor certification to enable the Alien, Bhajan Kaur, to fill the position of Domestic Cook. (AF 27). The job requirements were two years of experience, and the rate of pay was listed as $13.10 per hour. The Employer requested a Reduction in Recruitment ("RIR").

On May 21, 2002, the CO issued a Notice of Findings ("NOF") proposing to deny certification because the application failed to demonstrate that a bona fide job opportunity for a Domestic Cook existed in the Employer's household. (AF 21). Accordingly, the CO instructed the Employer to provide documentation that demonstrated the need for a Domestic Cook rather than a General Houseworker. The CO requested documentation regarding past performance of cooking duties, number of meals prepared on a weekly basis and the amount of time required to prepare the weekly meals, the Employer's entertainment schedule for the previous twelve months, the work and school schedules of all persons in the household, the number of pre-school or school-aged children in the household and whether the Alien would be required to care for the children or perform any other non-cooking duties, special dietary requirements of household members, the percentage of the Employer's disposable income devoted to paying the Alien's salary, the identity, duties, and work schedules of other domestic workers in the Employer's household, if any, whether the Employer had ever previously employed a Domestic Cook or the circumstances leading to the current job offer, the Alien's training and experience as a cook and the extent to which that experience was earned as a Domestic Cook, how the Alien learned of the job offer, and the nature of the Alien's relationship with the Employer. (AF 22). The NOF clearly stated that "[t]he adequacy of the documentation will be key to the evaluation of your application because little weight will be accorded to conclusory statements." (AF 21).

On June 24, 2002, the Employer submitted its rebuttal in which he responded that the Alien would be required to cook thirty meals per week (six per day) for five family members and the Employer's father. He estimated that the Alien would spend five to six hours per day preparing these meals and that the Alien would prepare eight to twelve meals per day when guests were invited. The Employer claimed that he entertained "1 to 2 times a week during the past 12 calendar months immediately preceding the filing of the application." (AF 8). However, he did not provide any documentation because he had "not maintained a diary of such invitations." The Employer provided the work schedule for himself and his spouse. All three of his children have not started school, and the Employer stated that his father would care for the children during the day. However, the Alien would perform childcare duties "during emergencies." (AF 8-9). The Employer stated that about twenty-five percent of his disposable income would be devoted to paying the Alien's salary, and he included a copy of his 2001 federal income tax return. (AF 9-18). The Employer asserted that no other domestic workers were employed in the household and that the need for a domestic cook arose when his spouse started working and his business increased. (AF 9). However, the Employer did not provide evidence documenting an increase in his business. Finally, the Employer declared that the Alien had four years of experience as a Domestic Cook and that she was an acquaintance of the Employer. (AF 10).

On October 17, 2002, a Final Determination ("FD") was issued in which the CO denied certification. On November 20, 2002, the Employer requested review of the denial of labor certification and the matter was docketed by the Board on May 8, 2003. (AF 1).

DISCUSSION

Twenty C.F.R. § 656.20(c)(8) requires that the employer offer a *bona fide* job opportunity. *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*). Whether a job opportunity is *bona fide* is determined by a "totality of the circumstances" test. *Id.* A labor certification application for a Domestic Cook is usually scrutinized to determine whether a *bona fide* job opportunity exists because few households retain an

employee whose only duty is to cook. *Carlos Uy III*, 1997-INA-304 (March 3, 1999)(*en banc*).

When a CO denies certification pursuant to 20 C.F.R. § 656.20(c)(8), administrative due process mandates that the CO specify the reasons the application does not appear to present a *bona fide* job opportunity. *Carlos Uy III*, *supra*. Nevertheless, the employer ultimately bears the burden of proving that it is offering a *bona fide* job opportunity. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988)(*en banc*); 20 C.F.R. § 656.2(b).

The Employer argues on appeal that he answered all the questions posed by the CO and that the FD was in error because it did not articulate specific grounds for denial. (AF 1-3). However, the CO noted that the Employer had only used a cook to prepare one to two meals per week in the year before the application. (AF 5). The CO also noted that the Employer has three children who are not yet in school and that both the Employer and his wife are not at home for seven hours each day. The CO was not convinced that the Employer's father would care for the three children during these hours, especially in light of the fact that the Employer had never previously employed a Domestic Cook and his rebuttal evidence did not demonstrate that he entertains frequently. Further, the CO noted that the rebuttal was unclear regarding the six meals that the Alien would prepare on a daily basis. The CO was not convinced that the Alien would not be involved in child care duties during the day. (AF 6). Indeed, the Employer's rebuttal stated that the Alien would perform these duties on an emergency basis and that only five to six hours per day would be spent preparing meals. (AF 9). Accordingly, the FD adequately explained the reasons for denying certification. The CO properly denied the Employer's request for RIR; however, the CO denied the application outright, which was in error.

Twenty C.F.R. § 656.21(i) provides that a CO "may" reduce or eliminate an employer's recruitment efforts if the employer successfully demonstrates that it has adequately tested the labor market with no success at least at the prevailing wage and working conditions. The purpose of the RIR regulations is to expedite applications in

occupations where there is little or no availability of U.S. workers. Twenty C.F.R. § 656.21(i)(5) provides that "unless the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer shall return the application to the local (or State) office so that the employer might recruit workers to the extent required in the Certifying Officer's decision." The CO, in this case, issued an FD denying certification. This is in error, as upon ruling on and denying an RIR request, the CO should return the case to the local office for processing. *See Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). Accordingly, this case is remanded to the CO with a mandate to remand the case to the State Workforce Agency for further processing.

ORDER

The Certifying Officer's denial of reduction in recruitment is **AFFIRMED.** The Final Determination denying labor certification, however, is **REVERSED** and this matter is **REMANDED** with instructions to remand the application to the State Workforce Agency for regular labor certification processing.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk

Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five doublespaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.